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No. 95-1201

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

VICKY M. LOPEZ, CRESCENCIO PADILLA, WILLIAM A. MELENDEZ, and DAVID SERENA, *Appellants*,

v.

MONTEREY COUNTY, CALIFORNIA, STATE OF CALIFORNIA, *Appellees*,

and

STEPHEN A. SILLMAN, *Intervenor-Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

APPELLANTS' REPLY IN OPPOSITION TO APPELLEE STATE OF CALIFORNIA'S MOTION TO DISMISS OR AFFIRM

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The basis for the State of California's Motion to Dismiss or Affirm is that since there are several outstanding issues for the District Court to resolve, which may result in the dismissal of this action to enforce Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, the questions presented by this appeal are not substantial enough to warrant the noting of probable jurisdiction. The State contends that not all of the facts have been presented and there has not been a final

determination of Section 5 liability. Absent such a determination, the State argues, the present appeal should be dismissed. Yet these arguments are speculative and irrelevant to the issue presently before the Court.

The State's arguments discount two simple facts: 1) Monterey County is subject to the Section 5 preclearance provisions; and 2) the at-large method of electing municipal court judges has not received Section 5 approval.[1] Indeed, in arguing that injunctive relief is not appropriate "[u]nless and until the court below determines that Section 5 in fact applies here", Appellee St. of Calif. Mot. to Dismiss or Affirm. at 18 [Appellee Mot.], the State turns Section 5 on its head. For covered jurisdictions such as Monterey County, the very purpose of Section 5 is to prohibit implementation of voting changes until they have been precleared. Absent such Section 5 approval, the Court has consistently held since 1966,[2] that voting changes subject to the Section 5 preclearance provisions cannot be implemented in any elections. *State of South Carolina v. Katzenbach*, 383 U.S. 301, 335, 86 S.Ct. 803, 822 (1966). *See also Clark v. Roemer*, 500 U.S. 646, 652 - 653, 111 S.Ct. 2096, 2101 (1991) (§ 5 plaintiffs entitled to enjoin unprecleared voting change). Thus, the at-large system for electing municipal court judges cannot be implemented in any elections.

The District Court's November 1, 1995, Order, implementing an at-large election for municipal court judges, which has not received

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[1] As noted in Appellants' Jurisdictional Statement, the implementation of a series of county ordinances resulted in the consolidation of two municipal courts and seven justice courts into one county-wide municipal court. The method of electing judges was changed from nine election districts to one at-large election, which has not received Section 5 approval. Appellants' J.S. at 6, 9 - 10.

[2] Appellants' J.S. at pp. 13 - 17 (listing of § 5 precedent).

Section 5 approval, is contrary to this precedent[3] and thus, presents substantial questions warranting the noting of probable jurisdiction.

The State's Arguments are Speculative and Irrelevant.

The State raises several arguments in support of dismissal of this appeal or affirmance of the District Court's November 1, 1995, Order. These arguments are without substance.

A. Unresolved Issues Do Not Preclude Injunctive Relief - The State argues that an appeal of an interlocutory order where outstanding legal issues remain to be adjudicated does not present any substantial questions warranting the noting of probable jurisdiction. This argument should be rejected.

First, this argument assumes that the State will prevail in the dismissal of this Section 5 action. Such speculation cannot circumvent the Court's Section 5 precedent requiring the issuance of injunctive relief to prevent the implementation of an unprecleared voting change. The Appellants can equally speculate that the State will not succeed.

Second, there is no requirement in any of the Section 5 cases cited by the Appellants that there must be a final resolution of Section 5 liability before the issuance of injunctive relief. Such a rule would foreclose any attempts to secure temporary restraining orders or preliminary injunctions in Section 5 actions. To follow the State's proposed scheme, Section 5 relief could not become effective until all of the legal questions have been resolved by both the District Court and this Court. Clearly, such a rule would result in circumvention of Section 5 by permitting the implementation of a discriminatory voting

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[3] The District Court could have avoided this conflict by implementing less drastic alternatives, such as extending the judicial terms of those judges already in office. *See Brooks v. State Bd. Elections*, 790 F.Supp. 1156 (S.D.Ga. 1990).

change until there was a final adjudication by this Court. Such a rule would undermine the protections afforded by Section 5 which seeks to shift "... the advantages of time and inertia from the perpetrators of the evil to its victims." *United States v. Bd. of Com'rs of Sheffield, Ala.*, 435 U.S. 110, 121, 98 S.Ct. 965, 974 (1978).

Third, the State's arguments disregard the District Court's conclusion in the November 1, 1995, Order that there is a continuing Section 5 violation in this action. Appellants' App. 2. As a result of the District Court's previous Order of March 31, 1993, Appellants' App. 12, the judicial district county consolidation ordinances culminating in a single at-large election judicial district, cannot be implemented absent Section 5 approval. The November 1, 1995, Order, requiring at-large judicial elections, contravenes both the District Court's previous ruling and this Court's Section 5 precedent. In the face of this existing Section 5 violation, the State's speculation that it will succeed in litigating subsequent issues cannot justify implementation of an unprecleared change.

B. Unprecleared Voting Changes Constitute A Continuing Section 5 Violation - The State argues that the Appellants are guilty of laches and thus, the District Court will dismiss this Section 5 action. Appellee Mot. at pp. 3, 7 & note 8, 14. The State's laches argument cannot serve as a bar to this Section 5 action. First, the obligation to comply with Section 5 is upon Monterey County and the State, not upon the Appellants. *Dotson v. City of Indianola*, 514 F.Supp. 397, 401 (D.C.Miss. 1981), *aff'd*, 456 U.S. 1002, 102 S.Ct. 2287 (1982) ("Congress imposed upon the covered states the burden of submitting any change in voting procedures for approval in Washington, D.C., before it became effective."). Second, a violation of Section 5 occurs every time there is an election held pursuant to an unprecleared election change. *Id.* ("The duty to obtain federal approval of new voting [changes] ... is a continuing one. It arises anew each time the defendant enacts or seeks to administer an uncleared voting regulation."). The State's laches argument here is

without merit.

C. State Statutes Affecting Section 5 Covered Jurisdictions Are Subject to Preclearance - The State argues that Monterey County is conducting at-large elections for municipal court judges, not pursuant to the county ordinances, but pursuant to certain state statutes and constitutional provisions. The State further argues that there has been no ruling that these statutes and constitutional provisions are subject to Section 5. *See, e.g.*, Appellee Mot. at pp. 13 - 14, n. 18. The State also suggests that since the State is not subject to Section 5, these statutes and constitutional provisions are exempt from Section 5 approval.

Yet, applicable precedent requires the Section 5 approval of state statutes when the statutes affect Section 5 covered jurisdictions, even if the State is not a covered jurisdiction. *See e.g., Johnson v. De Grandy*, __ U.S. __, 114 S.Ct. 2647, 2652, n. 2 (1994) (where the State of Florida, which is not a Section 5 covered jurisdiction, submitted a legislative redistricting plan to the United States Attorney General for Section 5 approval, because five of its counties are subject to Section 5). *See also Shaw v. Reno*, __ U.S. __, 113 S.Ct. 2816, 2820 (1993); *United Jewish Organizations, Etc. v. Carey*, 430 U.S. 144, 148, n. 3, 97 S.Ct. 996, 1001, n. 3 (1977). This precedent exposes the State's argument as meritless.[4]

D. The State Cannot Challenge The County's Section 5 Designation In This Proceeding - The State argues that "... no court has yet considered the constitutional propriety of Monterey County's initial designation as a covered jurisdiction under Section 5." Appellee Mot. at p. 15. This argument is not only without merit, but raised in an improper forum.

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[4] Moreover, the plain language of Section 5 requires the preclearance of all changes affecting voting. No distinction is drawn between local and state changes.

The State and Monterey County cannot challenge the administrative determination which subjected the County to Section 5. *Briscoe v. Bell*, 432 U.S. 404, 97 S.Ct. 2428 (1977). The only method of exemption available to Monterey County is to file a declaratory judgement in the United States District Court for the District of Columbia seeking an exemption based upon a ten-year history of compliance with the Voting Rights Act. 42 U.S.C. § 1973 b (a) (1). Unless and until that exemption is granted, the State and the County may not unilaterally declare the provisions of Section 5 to be unenforceable.[5]

E. Injunctive Relief Is The Appropriate Remedy For A Section 5 Violation - The State argues that injunctive relief should be denied because there has been no demonstration of any harm, because of the absence of any voting discrimination attributable to Monterey County, and among other reasons,[6] the purported elimination of the literacy

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[5] In addition, the State's interpretation of *Castro v. State of California*, 85 Cal.Rptr. 20 (1970) is in error. *Castro* only declared unconstitutional the English literacy test as it applied to persons who were literate in Spanish. The State was free to implement a literacy test as long as it was not solely in the English language. *Id.*, 85 Cal.Rptr. at 30. Thus, the State's discussion regarding its anticipation of federal policies relating to the elimination of the literacy test is equally flawed. Appellee Mot. at p. 19.

[6] The State also contends that the population inequality of the judicial election districts in 1968 does not permit a meaningful analysis for determining whether there has been retrogression of minority voting strength. Appellee Mot. at p. 19, n. 23. Since this issue has yet to be determined by the District Court, the State opines that injunctive relief is not warranted at this time. This argument misses the mark. The relevant issue is whether there has been an implementation of an unprecleared voting change, not whether the 1968 judicial election districts are susceptible to an analysis of

test prior to Monterey County's coverage determination. Yet these reasons are simply not pertinent to either the factual or legal issues presented by this appeal. The relevant facts are relatively straightforward: Monterey County is a jurisdiction subject to Section 5; the at-large method of electing municipal court judges has not received Section 5 approval.[7] Absent such Section 5 approval, applicable precedent requires the issuance of injunctive relief.

F. The Extreme Circumstances Exception Does Not Apply - The State argues that the unique posture of this case constitutes extreme circumstances justifying the denial of injunctive relief. Appellee Mot. at pp. 21 - 23. The State's list of such circumstances ranges from the laches argument, the absence of a final determination on a variety of issues, to the absence of any finding of voting discrimination attributable to Monterey County in determining Section 5 coverage. Space does not permit a response to each of these circumstances.[8]

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retrogression of minority voting strength.

[7] The State consistently ignores that the United States Attorney General in an administrative determination dated November 13, 1995, concluded that the at-large method of electing municipal court judges has not been submitted for preclearance and thus has not received Section 5 approval. Appellants' J.S. at pp. 9 - 10.

[8] The recitation of these circumstances demonstrates the State's misunderstanding of the operation of Section 5. For example, the State refers to the absence of a corollary Section 2 challenge as highly significant. Under Section 2 of the Voting Rights Act, minority voters can challenge an election practice or structure because such a practice or structure denies the minority community an equal opportunity to participate in the political process and elect a candidate of its choice. 42 U.S.C. § 1973. However, under existing precedent, Appellants cannot initiate a Section 2 action against the at-large election system. According to *Connor v. Waller*, 421 U.S. 656, 95

However, such an individualized response is not necessary, since the State misunderstands the "extreme circumstances" exception specified in *Clark, supra*, 500 U.S. at 654, 111 S.Ct. at 2102.

The extreme circumstances exception relates to the practical realities in seeking to enjoin an election which is already in progress. As an election timetable progresses, there is a greater reluctance by the federal judiciary to disrupt the election. However, in Section 5 actions, such reluctance is offset by the important federal interest in complying with a statute which protects minority voting rights. Consequently, as noted by the Court, the instances where an election based upon an unprecleared voting change is permitted to go forward are very rare: "An extreme circumstance might be present if a seat's unprecleared status is not drawn to the attention of the State until the eve of the election and there are equitable principles that justify allowing the election to proceed." *Id.* As related in the Appellants' Jurisdictional Statement, there were no such extreme circumstances present which justified the implementation of an unprecleared voting change as mandated by the District Court's November 1, 1995, Order. Appellants' J.S. at pp. 18 - 25.

G. Section 5 Precedent Is Controlling - The State argues that the Section 5 precedent cited by the Appellants is distinguishable because "... the Section 5 *liability* is yet unresolved, ... the challenged ordinances were implemented long ago, and ... the passage of time has made a return to the 1968 status quo impossible." Appellee Mot. at pp. 23 - 25. These "distinctions" miss the mark.

S.Ct. 2003 (1973), until the at-large election system secures Section 5 approval, this system is deemed to be unlawful and not in effect. Consequently, one cannot initiate a Section 2 challenge to an election system which is not in effect. If the at-large judicial election system ultimately secures Section 5 approval, then an action based upon Section 2 could be commenced.

First, Appellants have already demonstrated the flaw in the State's unresolved legal issues argument. *Supra*, at 3. Second, the fact that these county ordinances were first implemented over twenty years ago is not a bar to a Section 5 enforcement action. *See City of Lockhart v. United States*, 460 U.S. 125, 129, 103 S.Ct. 998, 1001 (1983) (Court noted that a Section 5 action was instituted six years after a change affecting voting occurred).

Finally, the inability to return to the 1968 status quo should not serve to deny Appellants of their Section 5 rights. If a return to the status quo is not feasible and the covered jurisdiction cannot cure the Section 5 violation, then the federal court has the "...'unwelcome obligation,' ... to devise and impose [an election] ... plan pending later legislative action." *Wise v. Lipscomb*, 437 U.S. 535, 540, 98 S.Ct. 2493, 2497 (1978). In fact, such action was taken by the District Court in implementing a temporary judicial division election plan for the June 6, 1995, special elections. Appellants' App. 16.

H. Court-Ordered Plan Standards - Appellants contend that court-ordered plans in Section 5 actions should follow certain standards. The State does not dispute this legal proposition. Moreover, the State does not dispute that such a federal court-ordered election plan must not result in a retrogression of minority voting strength. However, the State objects to the use of the temporary judicial division election plan utilized in the June 6, 1995, special elections as a benchmark for measuring any retrogression of minority voting strength because the plan is allegedly unconstitutional. Yet, by recognizing that the retrogression standard should be incorporated in a court-ordered plan, the State would be compelled to compare the at-large election system ordered by the November 1, 1995, District Court Order with another election plan. If no plan is available, then the District Court would compare the at-large election system with an election district plan which fairly reflects the voting strength of the minority voting community. *Wilkes County, Georgia v. United States*, 450 F.Supp. 1171, 1176 (D.D.C. 1978), *aff'd. mem.*, 439 U.S. 999, 99 S.Ct. 606

(1978). Such a plan would demonstrate that the at-large election plan results in a retrogression of minority voting strength.[9]

Conclusion

The State's arguments are completely without merit. For these reasons, the Appellee's Motion to Dismiss or Affirm should be denied.

Dated: March 8, 1996.

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[9] The judicial election plan in place in 1968 consisted of election districts. At the time, judicial election districts in Monterey County were reflective of the State's policy preferences, which are not the subject of any judicial challenge. In formulating a court-ordered plan, a federal court will defer to such policy preferences. *Upham v. Seamon*, 456 U.S. 37, 41 - 42, 102 S.Ct. 1518, 1521 (1982). Accordingly, the fairly drawn election plan would also have to consist of similar districts. Given the minority concentrations in Monterey County, Appellants' J.S. at pp. 3 - 4, such an election plan would contain at least two predominantly minority judicial districts. Compared to this district plan, the at-large election system must be viewed as a retrogression of minority voting strength.